Supreme Court, U.S.
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No. 88-48

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

**OFFICER PRAET, individually and as a Police Officer of the City of Orange,**
*Petitioner,*

*vs.*

**SONYA KINGSLEY,**
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October Term, 1987

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OFFICER PRAET, individually and as a Police Officer of the City of Orange, Petitioner,

vs.

SONYA KINGSLEY
Respondent.

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# BRIEF IN OPPOSITION TO PETITIONER FOR WRIT OF CERTIORARI

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## I. STATEMENT OF THE CASE

Petitioner seeks review in this Court of the California Court of Appeal's decision that he violated Respondent's constitutional rights by searching her purse for evidence of criminal activity without probable cause. Specifically,

Petitioner claims that the Court of Appeal's analysis of qualified immunity doctrine is at odds with the decisions of this Court, particularly this Court's decision in Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

However, as discussed below, the Court of Appeal's decision and analysis on this issue was an ordinary application of accepted principles which do not raise any issue worthy of review by this Court. Moreover, Petitioner has distorted the record in this case in the Petition by claiming, contrary to the record below, that the search of Respondent's purse was for purposes of "further identification." (Petition, at 7.) In fact, Petitioner testified at trial that this search was to find evidence of "fruits of some kind of fraudulent activity." (Petition, at

A-29.) Petitioner may not recast his testimony and the record in this case in an attempt to manufacture a qualified immunity defense.

## II. REASONS FOR DENYING THE WRIT

### A. The Court of Appeals Decision Is a Traditional Application of Qualified Immunity Principles.

The application of qualified immunity principles by the Court of Appeal was clearly correct and unremarkable in terms of qualified immunity doctrine.

Petitioner made two searches of Respondent's purse. The first was for identification purposes and was upheld by the court under Terry v. Ohio, 392 U.S. 1 (1968). However, the second search was conducted to look for evidence of crime. (Petition, at A-32.) This search was conducted without probable cause, as is

required under clearly established law that any reasonable police officer would be aware of. See, Ybarra v. Illinois, 444 U.S. 1049 (1979); United States v. Robinson, 414 U.S. 218, 235 (1973); Chimel v. California, 395 U.S. 752, 763 (1969); Sibron v. New York, 392 U.S. 40 (1968). The Court of Appeal found that, although Petitioner had enough reasonable suspicion to conduct his initial search of Respondent, there were no facts known to him that provided him probable cause to conduct the second search of Respondent's purse.[1] As a result, the Court of Appeal found that Petitioner was not entitled to qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, (1982).

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[1]This Court will not reexamine a state court's findings of fact. Grayson v. Harris, 267 U.S. 352, 358 (1925); Portland Ry. Co. v. Railroad Commission, 229 U.S. 397, 412 (1913).

The above analysis is entirely consistent with Harlow and with Anderson v. Creighton, supra. There can be no question about the requirement of probable cause for the second search of Respondent's purse. This requirement was as "clearly established" as any Fourth Amendment principle can be. The Court of Appeal was clearly correct given the record in this case in finding that Petitioner lacked probable cause to conduct the search.

Perhaps recognizing that the Court of Appeal's decision cannot be faulted on this basis, Petitioner makes a variety of meritless claims in an effort to induce this Court to accept this case.

First, Petitioner claims that the Court of Appeal erred in requiring that Petitioner have a "subjective belief in having probable cause to arrest."

(Petition, at 12.) While the Court of Appeal's opinion states that Petitioner did not claim a subjective belief that he had probable cause to arrest Respondent, it is clear that the Court found that under the objective facts known to Petitioner and the clearly established legal norms applicable to the search at issue, there was no probable cause for the second search of Respondent's purse. There is nothing in the Court of Appeal's opinion that indicates that the Court of Appeal required a showing of a subjective belief in probable cause as a prerequisite to a claim of qualified immunity. Moreover, the Court of Appeal's focus on the objective facts known to Petitioner is clearly the appropriate analysis under Harlow and Anderson. Under this objective test, Petitioner's claim of qualified immunity must fail.

Next, Petitioner claims that the Court of Appeal erred by failing to give "serious consideration to the unsettled law in California regarding searches for identification." (Petition, at 12.) Of course, the second search of Respondent's purse was not for identification but was for evidence of criminal activity. In any event, any uncertainty in California state law is irrelevant to the issue of qualified immunity under 42 USC § 1983. See Davis v. Scherer, 468 U.S. 183, 195 (1984). The Court of Appeal found a violation of Respondent's federal rights in this circumstance. There is no uncertainty in the clearly established federal law applied by the Court of Appeal in these circumstances.

Finally, Petitioner contends that he will be precluded from ever presenting his qualified immunity defense if this

Court does not grant review. This peculiar argument rests on the erroneous premise that the qualified immunity defense arises only after a constitutional violation is determined. Petitioner should have asserted his qualified immunity affirmative defense at every stage of these proceedings. By failing to raise this defense Petitioner waived his right to assert it. The Court of Appeal was not even obliged to consider this issue. In any event, Petitioner's qualified immunity defense is unavailing based on the clearly established law governing the search at issue.

## III. CONCLUSION

There is no issue presented by the Petition which warrants review by this Court. The Court of Appeal properly applied the qualified immunity doctrine of this Court in the circumstances of this case.

The Petition should be denied.

DATED: July 29, 1988

Respectfully submitted,


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